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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-456

STAR INDUSTRIES, INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. 15a–27a) is reported at 462 F. 2d 557. The opinion of the Customs Court (Pet. App. 1a–13a) is reported at 320 F. Supp. 1018.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on June 22, 1972. The petition for a writ of certiorari was filed on September 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTIONS PRESENTED

The President reduced the tariff on brandy to all nations including Spain (which is not a member of the European Economic Community). The question presented is whether the President, upon cancelling the reduction because of the Community's tariff increases on imports from the United States, acted within his authority in applying the cancellation to brandy from countries not members of the Community.

STATUTES AND AGREEMENT INVOLVED

The Trade Expansion Act of 1962, Public Law 87-794, 76 Stat. 872, codified as 19 U.S.C. 1801 *et seq.*:

> SEC. 102 [19 U.S.C. 1801]. *Statement of purposes*
>
> The purposes of this chapter are, through trade agreements affording mutual trade benefits—
>
> (1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce;
>
> (2) to strengthen economic relations with foreign countries through the development of open and nondiscriminatory trading in the free world; and
>
> (3) to prevent Communist economic penetration.
>
> * * * * *
>
> SEC. 251 [19 U.S.C. 1881]. *Most-favored-nation principle*
>
> Except as otherwise provided in this subchapter, in section 1351 of this title, or in section 401(a) of the Tariff Classification Act of 1962,

any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this subchapter or section 1351 of this title shall apply to products of all foreign countries, whether imported directly or indirectly.

SEC. 252 [19 U.S.C. 1882] *Foreign import restrictions*

(a) * * *

(b) * * *

(c) Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 1801 of this title, and having due regard for the international obligations of the United States—

(1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or

(2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.

SEC. 255 [19 U.S.C. 1885] *Termination or withdrawal of trade agreements; termination of proclamations*

(a) * * *

(b) The President may at any time terminate, in whole or in part, any proclamation made under this subchapter.

Section 350(a)(6) of the Tariff Act of 1930, as amended, renumbered by Section 3(a)(7) of the Trade Agreements Extension Act of 1958, codified as 19 U.S.C. 1351(a)(6):

> The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

Presidential Proclamation No. 3564, 77 Stat. 1035, is reproduced at Pet. App. 35a–37a. The General Agreement on Tariffs and Trade, 61 Stat. A3, T.I.A.S. No. 1700 provides in pertinent part:

> Article I
>
> General Most-Favoured-Nation Treatment
>
> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation * * *, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

STATEMENT

1. Petitioner is an importer of Spanish brandy, who brought this action in the Customs Court challenging the legality of Presidential Proclamation 3564, 77 Stat. 1035 (1963), which suspended certain presidentially-granted trade concessions and thereby returned the duty on brandy and certain other products to a previous higher level (Pet. App. 15a–16a).

More specifically, the statutory duty of $5.00 per gallon on brandy was originally contained in Paragraph

802 of the Tariff Act of 1930 (Pet. App. 33a). In 1947, the rate was reduced to $1.25 per gallon under a tariff concession granted to France, a member of the European Economic Community ("EEC"). Pursuant to the General Agreement on Tariffs and Trade, however, the reduction was made on a most-favored-nation basis and thus was also applied to Spanish brandy, although Spain is not a member of the EEC (Pet. App. 19a).[1]

In 1963, following an increase in the EEC's tariff on frozen poultry, the President issued proclamation 3564, withdrawing the reduction in the tariff on brandy (among other commodities). Under the most-favored-nation principle, the withdrawal of the reduction was not limited to EEC members, but covered all countries to which the reduced tariff had applied, including Spain (Pet. App. 18a).

The President expressly relied upon two separate and independent grants of legislative authority (Pet. App. 36a):

(1) Section 252(c) of the Trade Expansion Act of 1962, 19 U.S.C. 1882(c), which permits the President to "suspend, withdraw, or prevent the application of trade agreement concessions to products" of a

[1] "Most-favored nation" refers to the policy of according like tariff treatment to like products regardless of their country of origin. Thus, when the United States accorded a reduced tariff on brandy, under an agreement with France, Spanish brandy received the same reduction even though Spain had not negotiated the reduction. Similarly, when the United States raised its tariff on French goods, under the most-favored-nation principle it was required to raise its tariffs on similar goods produced by other countries so that France remains a nation as favored as any other.

country or instrumentality which maintains unreasonable import restrictions burdening United States Commerce, where such action is consistent with 19 U.S.C. 1801 and has "due regard for the international obligations of the United States;" and

(2) Section 350(a)(6) of the Tariff Act of 1930, as amended, 19 U.S.C. 1351(a)(6), which authorizes the President to "terminate, in whole or in part, any proclamation made pursuant to this section."[2]

The Proclamation recited that the President was acting with "due regard for the international obligations of the United States particularly paragraph 3 of Article XXVIII of the General Agreement on Tariffs and Trade requiring any suspension of trade agreement concessions to be made on a most-favored-nation basis" (Pet. App. 35a).

2. The Customs Court held the proclamation invalid. It ruled that Section 252(c) permitted only selective action by the President, and that while Section 350(a)(6) could have supported the termination of all previous reductions, it interpreted the presidential proclamation as increasing existing tariffs rather than withdrawing prior concessions. The Customs Court found this controlling although, if interpreted as an increase, the increase was to the exact level the tariffs would have had if all presidential reductions had been revoked (Pet. App. 9a–13a). The Customs Court, discussing only Section 252(c) ruled that there was no "international obligation of the United States" to be

[2] The statutory rate on brandy had been reduced by trade agreements proclaimed under the authority of Section 350 (Pet. App. 33a).

taken into account under that section (see Pet. App. 25a).[3]

The Court of Customs and Patent Appeals reversed and sustained the proclamation under Section 252(c).[4] After concluding that most-favored nation treatment was contemplated by GATT Article XXVIII:3 (Pet. App. 22a–25a), the court ruled that Section 252(c) allows the President to take action on the most favored nation basis when he determines that such action is required by our international obligations (Pet. App. 25a). It held that such action would be consistent with the purposes of the Act, set forth in 19 U.S.C. 1801, to stimulate this country's economic growth, enlarge foreign markets and develop "open and non-discriminatory trading in the free world" (App. 26a) and would further the Congressional intent of Section 252 "to provide the President with strong measures to combat foreign trade discrimination" (App. 27a).

ARGUMENT

The decision of the Court of Customs and Patent Appeals is correct, and is not in conflict with any decision of this Court, or other federal court. Further review is unwarranted.

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[3] The Customs Court reasoned that the GATT Article cited by the President as the international obligation involved "does not *require* suspension of trade agreement concessions on a most favored nation basis" (emphasis in original) (Pet. App. 8a). The Court of Customs and Patent Appeals rejected this interpretation of the GATT (Pet. App. 22a–25a), and petitioner apparently does not challenge the court's decision on that point. See Petition at 8.

[4] In light of its disposition of the case, the court found it unnecessary to reach the issue involving Section 350(a)(6).

A. *The proclamation is valid under Section 252(c).*

1. The Court of Customs and Patent Appeals held that the President, in cancelling under Section 252(c) tariff reductions given to countries which imposed unreasonable import restrictions against American products, may apply the cancellation to countries which themselves have not imposed restrictions upon imports from the United States, where he concludes that such application would further this country's international obligations and the purposes of the Act. This construction accords with the purpose of Section 252(c). The congressional intent was to enable the President to "take all appropriate and feasible steps within his power" to eliminate all foreign import restrictions which unduly burden the United States' commerce, and to "enlarge the authority of the President" for this purpose. H. Rep. No. 1818, 87th Cong., 2d Sess. 21 (1962); S. Rep. No. 2059, 87th Cong., 2d Sess. 2 (1962).[5]

The language of Section 252(c), while authorizing the President to act against a single country where appropriate, nowhere indicates that only such action is permitted. Indeed, Congress required that the President's action must be consistent with the Act's purposes (see 19 U.S.C. 1801) and have due regard for this country's international obligations. When, as the President concluded in the present case (Pet. App. 35a), both of these considerations required raising the

[5] See, *e.g.*, Representative Smith's statement that Section 252(c) provides "additional authority" to the President, 108 Cong. Rec. 19871 (1962), and Senator Jackson's admonition that "We must give the President full power," 108 Cong. Rec. 19875 (1962).

duty to all countries and not just to those which had raised their duties on American products, the statute permits him to do so.

Nowhere in the extensive legislative history of the Trade Expansion Act is there the slightest hint that Congress intended that the President should be prevented from taking action under Section 252(c) against all countries where necessary to carry out this country's most-favored-nation tariff policy. To the contrary, the Senate Committee Report at least suggests that most-favored-nation actions are the norm, since it points out that "import restrictions imposed under section * * * 252 of title II *need not apply* to products of all countries." (Emphasis supplied). S. Rep. No. 2059, *supra*, at 16.

Moreover, Section 252(c) specifically requires that the President's action have "due regard for the international obligations of the United States." The Senate Report explained (*id.* at 2-3) that:

> the amendment would not authorize any indiscriminate breach of international obligations of the United States *such as our most favored nation treaties* with regard to the products of other countries. [Emphasis supplied.]

2. Petitioner, now apparently conceding the principal issue before the court below, *i.e.* whether GATT Article XXVIII:3 on withdrawal from agreements, when read with GATT Article I (see p. 4 *infra*) requires that withdrawal of concessions be on a most-favored nation basis (see Pet. at 8), contends primarily that GATT is not the type of "international

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obligation" of which the President must take due regard under Section 232(c) (Pet. 9-14).* The terms and legislative history of Section 232(c) refute this position.

Section 232(c) does not limit the President to considering only this country's formal treaties; rather Congress required that action taken under that section have due regard for all "the international obligations of the United States." While the GATT is not a treaty in the Constitutional sense, since the Senate has not ratified it, it is an international obligation. This Court has frequently held that such reciprocal executive agreements are internationally binding. See *B. Altman & Co.* v. *United States*, 224 U.S. 583; *United States*

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* Petitioner also argues that the case presents a conflict between an executive agreement, the GATT, and a subsequent statute, which it asks this Court to resolve by determining "the status in domestic law" of the GATT (Pet. 5-9). Petitioner asserts that the court below held that Section 232(c) "was controlled by the relevant provisions of GATT" (Pet. at 8). Petitioner misconstrues the decision below. The Court of Customs and Patent Appeals did not hold that the most-favored-nation principle embodied in GATT renders Section 232(c) nugatory; rather it held that the President may increase the tariff against all countries where he believes such action is necessary to carry out the purposes of the Act and is consistent with our international obligations. The court did not hold, as petitioner suggests, that the President must always so act or that GATT controls in any conflict with Section 232(c). For as petitioner admits, "the President presumably had authority under Section 232 to act inconsistently with it [GATT] if he found such action appropriate after having due regard for our country's international obligations" (Pet. 10).

v. *Belmont*, 301 U.S. 324; *United States* v. *Pink*, 315 U.S. 203.[7]

Moreover, GATT is today and was when Congress was considering the Trade Expansion Act the cornerstone of this country's international trade policy. At the time the Trade Expansion Act was passed, the United States had mutual trade obligations with fifty countries under the GATT, but only eight bilateral trade agreements. See U.S. Tariff Commission, *Operation of Trade Agreements Program*, 16th Report, July 1963–June 1964, pp. 63–64 (1965).

Congress was informed, during hearings on the Act, that the United States intended to use the GATT as the primary mechanism for tariff negotiations under the proposed Act. See House Ways and Means Committee, Hearings on H.R. 9900, 87th Cong., 2d Sess., pp. 3864–3865 (statement by Under Secretary of State Ball); and Senate Finance Committee, Hearings on H.R. 11970, 87th Cong., 2d Sess., pp. 65–67 (statement by Secretary of Commerce Hodges), pp. 2172–2181 (statement by Secretary of Agriculture Freeman); 108 Cong. Rec. 19873 (remarks of Senator McCarthy).

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[7] Several state courts have held that GATT is a treaty in the constitutional sense. *E.g.*, *Territory of Hawaii* v. *Ho*, 41 Hawaii 365, 367–368; *Baldwin-Lima-Hamilton Corp.* v. *Superior Court*, 25 Cal. Rptr. 798, 809 (D. Ct. App.). The Court of Customs and Patent Appeals has concluded that the GATT created an "international obligation" under Section 289(a)(1) of the Internal Revenue Code of 1939. *Bercut-Vandercook & Co.* v. *United States*, 46 CCPA 28, 31.

Congress did not intend that the President, in acting under Section 252(c), consider all our international obligations except the chief agreement governing this country's international trade.[8]

3. Petitioner also contends that the proclamation is invalid under the due process clause of the Fifth Amendment because the notice of public hearing (Pet. App. 38a–41a) issued pursuant to Section 252(d) of the Act failed adequately to inform interested parties of the action to be taken (Pet. 15–17). This issue is not properly before the Court.

Before the Customs Court petitioner stipulated (Pet. App. 34a):

> Plaintiff does not raise any issue in respect to the compliance with the procedural requirements of Section 252(d) of said act in providing an opportunity for the presentation of views concerning foreign import restrictions referred to in Section 252(c) * * *.

This stipulation included the adequacy of the notice. It is section 252(d) which provides for giving "an opportunity for the presentation of views concerning foreign import restrictions" and also for

[8] The decision below does not conflict with *The Five Per Cent. Discount Cases*, 243 U.S. 97. There this Court agreed with the Government's contention that a statute providing for a tariff discount on goods shipped in American vessels, where this did not impair treaty provisions, could not be construed to give the same benefit to goods carried in non-American bottoms from countries with which we had reciprocal trade agreements. The court there held that the construction advocated by the importers would be inconsistent with "the purpose to favor American shipping [which] was the manifest inducement for putting the subsection in." 243 U.S. at 107. No such inconsistency is present here.

"public hearings" to be held "after reasonable notice." 19 U.S.C. 1882(d).[7] The giving of adequate notice is one of "the procedural requirements of Section 252(d)" within the stipulation.

B. *The Proclamation is valid under Section 350(a)(6).*

The judgment of the Court of Customs and Patent Appeals may also be sustained upon the alternative ground, which that court did not reach, that the proclamation was justified under Section 350(a)(6) of the Tariff Act of 1930.

The parties stipulated that the statutory duty on brandy had been reduced "by various trade agreements [*i.e.* proclamations] proclaimed under the authority of Section 350 of the Tariff Act of 1930" (Pet. App. 33a). Section 350(a)(6) provides that "The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section." Proclamation 3564 expressly stated that the President acted under that section (Pet. App. 36a).

The Customs Court agreed that Section 350(a)(6) authorized the President's action (Pet. 11a). But the court held that because the President also relied on Section 252(c), he was precluded from exercising the authority granted him by Section 350(a)(6) without the limitations which the court found inherent in Section 252(c). In particular, the court pointed to the fact that the rates which went into effect were set forth in the proclamation and in Part 2B of the Appendix of the Tariff Schedule (Pet. App. 11a).

[7] The rates set forth in the proclamation were the statutory rates which go into effect automatically upon termination of trade agreement rates. See footnote 2, *supra*.

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This reasoning will not withstand analysis. If, as the Customs Court correctly pointed out, the President has the power to terminate previously proclaimed reductions by proclamation, this power is not lost because the President additionally includes the rates which will go into effect after the previous reduction is removed in the proclamation and in the Appendix to the Tariff Schedules. *United States* v. *Metropolitan Petroleum Corp., supra,* 42 CCPA 38, 43, 47. The Court of Customs and Patent Appeals has consistently construed Section 350(a)(6) as authorizing the President to terminate presidentially proclaimed reductions irrespective of other provisions giving less extensive powers in other situations. *E.g., United States* v. *American Bitumuls & Asphalt Co.,* 44 CCPA 199, certiorari denied, 355 U.S. 883; *George E. Bardwil & Sons* v. *United States,* 42 CCPA 118; *United States* v. *Metropolitan Petroleum Corp., supra;* cf. *Barclay & Company, Inc.,* 41 Cust. Ct. 135, affirmed, 47 CCPA 133; *United States* v. *Schmidt Pritchard & Co.,* 47 CCPA 152, certiorari denied, 364 U.S. 919.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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